No. 43

IN THE

Supreme Court of the United States

October Term, 1952

MONTGOMERY BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL., *Petitioners*

vs.

LEDBETTER ERECTION COMPANY, INC.

BRIEF FOR THE

CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

ARTHUR J. GOLDBERG
General Counsel

DAVID E. FELLER
Assistant General Counsel

Congress of Industrial Organizations
718 Jackson Place, N. W.
Washington 6, D. C.

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CONSENT TO FILE

This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 27 of the rules of this Court. The interest of the CIO in this case, involving as it does the possible subjection of every CIO local and international union to injunctive proceedings in the courts of the 48 states, is obvious.

THE DECISION BELOW

In this case it may be as important to understand what the issues are as it is to discuss their resolution. The petitioner and the National Labor Relations Board argue the case, in their briefs, as if the question were whether a state court is given authority by the National Labor Relations Act, as

amended, to enforce the unfair labor practices provisions of that Act by way of injunction. The respondent, on the other hand, in its brief in opposition, seemed to take the position that the question was whether the State of Alabama could enjoin practices which it found to be illegal under state law even though they were also violations of the National Labor Relations Act.

Resolution of this apparent controversy as to the issue presented here necessarily must depend upon analysis of the opinion of the Supreme Court of Alabama. That opinion is not, of course, conclusive as to the scope of the federal questions involved. It is, however, conclusive as to the matters of state law which are involved, or may be involved. The Supreme Court of Alabama can be reversed by this Court with respect to federal questions. It cannot be reversed with regard to its findings as to what is involved in the case under the law of Alabama.

It is, therefore, important to determine exactly what the Supreme Court of Alabama did hold. There is language in its opinion that, at first glance, seems to look both ways. The Court clearly said that the question before it was whether the employer could obtain protection from the state courts of "a right which the Labor-Management Act has conferred upon him." (R. 51) It also said, however, that the employer's contention, which it upheld, was that the federal Act was not exclusive but left intact the traditional state remedies which "otherwise existed in the equity courts." (R. 48) The contention was, the court said, not that the amended federal Act granted power to the State court but that it removed the impediment contained in the original Act to the exercise of an existing remedy. It was pursuant to this line of argument that the court distinguished *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 Fed. 2d 183 (C. A. 4, 1948). In the *Amazon* case, the Alabama court said, the question was whether the amended Act gave a remedy to private parties in the federal courts. In this case, the question was whether the Act prevented the use of a previously existing remedy in the state courts. (R. 47-48)

The explanation of this apparent contradiction lies in the

distinction made by the Alabama court between the substantive right and the procedural remedy. Whether we agree that this distinction has validity or not, the Alabama court has apparently declared that the two are to be treated entirely separately and independently. The court decided these questions of right and remedy independently of each other, and the result the court reached is based as much upon this separation itself as it is upon the resolution of the issues separated.

Remedy: The Alabama court started with the assumption that the state courts had, prior to the enactment of the federal Act, the traditional power of courts of equity to enjoin unlawful picketing. This remedy was treated as entirely independent of whatever substantive law might make the picketing unlawful. It was said to rest "without other grant" (R. 49) on section 144 of the Constitution of Alabama.

The first question treated by the Alabama court was whether this pre-existing remedy "was taken away" (R. 46) by virtue of the provisions of the Wagner Act making Board jurisdiction over unfair labor practices exclusive. The court concluded that the federal Act had, indeed, barred the state from utilizing this pre-existing remedy.

This being so, the second question before the Supreme Court of Alabama was whether this "impediment in the use of the remedy then existing in a state court" (R. 46), which it held that the Wagner Act had created, was removed in turn by the Taft-Hartley Act. The court concluded that the change in the wording of Section 10(a) and the elimination of the word "exclusive" restored the pre-existing state jurisdiction. In the words of the Court "the Labor-Management Act . . . merely serves to eliminate that feature of the original Act which excluded all courts from exercising injunctive jurisdiction . . ." (R. 49)

It is important to keep in mind that this question of remedy was treated by the Alabama court entirely independently of the source of the right sought to be enforced. The fact that, before the Wagner Act was passed, the substantive right to be enforced was a state right while, after the Taft-Hartley Act removed the "impediment" to injunctive jurisdiction, the right to be enforced might be a federal right, was irrelevant

to the Alabama court's view. Indeed, the fact that there was no substantive federal law with respect to union unfair labor practices until the Taft-Hartley Act was passed seems not to have affected the court's reasoning as to the effect of the Wagner Act on the pre-existing state remedy. Looking only to the remedy—and not to the right—it found that a remedy existed before the Wagner Act, was taken away by the jurisdictional provisions of that Act, and restored by the amendment to the Act.

Substantive Right: The Alabama court did not discuss extensively the question of substantive right: i.e., the question of whether federal or state law, or both, could be relied upon to show the illegality of the union activity sought to be enjoined. This was natural, in view of the court's division of the issues between remedy and substance. There was no dispute, it said, about the substantive illegality of the activity. Whether the law defining the illegality was state or federal, or both, was logically immaterial since the question of remedy was treated by the court independently from the question of substance. As the court itself said (R. 50), "it is immaterial whether [the] right is one conferred by state or federal law unless prohibited by federal law. It is the existence of the right which is material, and not the source of its enactment . . ."

Although the Alabama court did not, therefore, regard itself as being required to decide whether federal or state law, or both, could be relied upon to show the illegality of the picketing sought to be enjoined, it is quite clear that it regarded the Federal law as both controlling *and* exclusive. Indeed, it treated the complaint as alleging *only* a violation of federal law (R. 41-42) and it ignored entirely any claim of violation of state law.

The only real discussion of the question of substantive law occurred in the court's discussion of *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, on pp. 50-51 of the record. "It is clear," the court said, "that in respect to commerce the Federal Congress has legislated defining unfair labor practices by labor organizations as well as by employers, and such definition supersedes any state legislation doing so." The *Amalgamated* case proves that. "It does fix

the status of unfair labor practices to the exclusion of state laws in respect to commerce. . . . We have here a federal law defining unfair labor practices in commerce, which takes precedence over any state law in that respect." But the only question in this case, according to the court, concerned remedy, not substance. The *Amalgamated* case, the *O'Brien* case (339 U. S. 454) and similar cases were, therefore, deemed irrelevant.

Conclusion: The Alabama court's conclusions rested directly on the reasoning summarized above. The picketing complained of was unlawful—whether by virtue of federal or state law being immaterial, although the court recognized that it was actually unlawful exclusively by virtue of federal law. The equity courts of Alabama had a pre-existing jurisdictional right to enjoin unlawful acts. This jurisdiction was taken away by the Wagner Act and restored by the Taft-Hartley Act. Hence, the courts of Alabama now had jurisdiction to issue the injunction prayed for.

The apparent conflict between the Alabama court's discussion of pre-existing—and hence, state rights—and rights conferred by the federal Act disappears as a result of his analysis. The court did not rest its conclusion on the existence of any substantive rights under state law. Indeed, it assumed that none existed, that the Taft-Hartley Act had pre-empted the field. The court's reference to the pre-existing law of Alabama was a reference to the injunctive powers of the Alabama courts, nothing more.

THE ISSUE BEFORE THIS COURT

It hardly requires a Hohfeld to recognize that there is something wrong with the reasoning of the Alabama court. The question actually asked by it, as to the existence or non-existence of a disembodied remedy, floating through the air without any connection with the right being enforced, cannot be sensibly answered because it is a nonsense question. The federal issues necessarily posed by the case must, therefore, be re-formulated by this Court. The state questions, however, cannot be so re-formulated, since this Court must take the law of Alabama as given by the decision of the Supreme Court of Alabama.

Two possible federal questions were raised by the pleadings in this case: 1) Can the Alabama state courts issue injunctions to enforce compliance by a union with the provisions of the Taft-Hartley Act?; 2) Can the Alabama courts issue injunctions against union conduct which is alleged to violate the Taft-Hartley Act, but which same conduct, for the very same reasons, violates a similar law or the policy of the State of Alabama?

The first question is clearly presented by the express allegation in paragraph 11 of the complaint that the union's action "is a violation of Section 8B(4) of the National Labor Relations Act as amended" (R. 5), by the allegation in paragraph 12 that the remedy under the federal Act is inadequate (R. 5) and by the prayer of the complainant for an order enjoining the union from "Engaging in any unfair labor practice as defined by the Labor-Management Relations Act" (R. 8).

The second question appears to be presented by the allegations in paragraph 15 of the complaint that the conduct complained of was: (a) a violation of Section 54, Title 14 of the Code of Alabama of 1950 (R. 7) in that it constituted a conspiracy for the purpose of hindering complainant from carrying on a lawful business (R. 7); (b) in violation of Section 57 of the same title because the picketing was unlawful under federal law (R. 7); (c) in violation of complainant's property rights (R. 8); and (d) unlawful interference with the right of complainant's employees to work (R. 8). No additional specific relief was requested, however, with regard to the alleged violations of state law. The complainant's prayer for relief was capable of resting entirely on the claimed violations of Federal law and the injunction granted by the trial court (R. 10-11) was in the precise terms of the prayer for relief (R. 8-9).

Although this second issue could have been decided by the Supreme Court of Alabama on the record before it, it was not so decided. The Alabama court ignored the allegations that state law had been violated. It said (R. 41) that "the allegations of the bill itself show that reliance is had upon the National Labor Relations Act as amended, for the purpose of determining whether or not the complainant is entitled to an

injunction," and it treated the case throughout as if no other allegations had been made.

In this posture, we think that the second question—whether Alabama could enjoin violations of its own law covering the same subject matter as the federal law—is not necessarily before this Court. The Alabama court treated the claim of violation of state law as non-existent and, on such matters, its decision is final. The only question which this Court has to decide, therefore, is the first question: whether the Alabama courts constitute a permissible agency for enforcement of the Taft-Hartley Act.

DISCUSSION

1. It is not the purpose of this brief to repeat arguments already made by the parties and by the National Labor Relations Board. And the notion that the Congress intended to entrust to the courts of the 48 states the power to enforce the Taft-Hartley Act is so repugnant to the text, the philosophy and the legislative history of that Act that further argument against it seems superfluous.

There is, however, one additional point which we would like to make, because it bears strongly upon the practical effect of the Court's decision in this case. The question whether the state courts may enjoin violations of the Taft-Hartley Act carries a somewhat different connotation when it is remembered that an affirmative answer means that those courts may issue such injunctions against alleged violations of the Act without notice or hearing; that such *ex parte* orders, under the practice of many states, carry no automatic expiration date or requirement that a hearing be promptly held on a motion to dissolve; and that, in the interim, substantial rights to participate in concerted activities, guaranteed by the Act, may be irreparably damaged without any possibility of relief. Unfair labor practice charges can be brought against a company that interferes with the legitimate concerted activities of its employees. They cannot be brought against a state court which accomplishes the same interference by an *ex parte* injunction based on untested, and often unfounded, claims that such activities violate the Act.

The difference between enforcement of the Taft-Hartley Act by the National Labor Relations Board, on the one hand, and by the state courts, on the other, is not adequately described by terming it simply a difference between administrative and judicial enforcement. It actually represents the difference between enforcement by an uninformed authority, on a bare claim of violation, without hearing or notice and prior to any determination of the facts or the law, and enforcement after at least a preliminary investigation by an impartial body familiar with the law involved. A strike enjoined is often a strike broken. Whether the strike was rightly or wrongly thus broken is often immaterial. The damage has been done and there is no redress. To authorize the courts of the 48 states to enjoin strikes because of claimed violations of federal law would authorize an unprecedented expansion in the business of strike breaking by preliminary injunction. We think that it cannot sensibly be argued that such a result was intended by Congress.

2. Exactly the same considerations, of course, are pertinent to what we have termed the second question: whether Alabama may enforce by injunction its own law or policy against the alleged unfair labor practices here involved.

As stated above, we do not believe that this question is necessarily before the Court, since the complaint here has been treated by the Alabama Supreme Court as alleging only a violation of the federal Act. But if, contrary to our belief, this Court feels it necessary or advisable to pass upon this second question, we respectfully submit that its answer must be the same as its answer to the first question. Independent regulation by the states of unfair labor practices, particularly where that regulation is by *ex parte* court order, carries exactly the same possibility of conflict with the Federal scheme of regulation as does enforcement by the states of the federal Act.

This Court has already decided, in *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953, that a state may not duplicate the unfair labor practice provisions of the federal act and enforce its own parallel provisions through the state's administrative agency. The possibilities of conflict in the type of statute involved in *Plankinton* are

as nothing compared to the possibilities inherent in state legislation which permits the kind of *ex parte* injunction issued in this case. It is not enough to say that the ultimate resolution of the controversy under a state statute must accord with the governing federal law so that activities protected by the federal law are not restricted. Unless it is clearly said, as this Court indeed has said, that "Congress occupied this field and closed it to state regulation" (*Automobile Workers* v. *O'Brien*, 339 U. S. 454, 457), thus barring *ab initio* the use of the state's injunctive power, the very real possibility exists that activities which the federal Act protects will be forbidden by the states, at least until the state court has had the opportunity to pass upon the merits. And this type of temporary action, reversed although it ultimately may be, involves just as great a conflict, indeed, perhaps a greater conflict, than enforcement through an administrative agency of a parallel state labor relations statute.

Respectfully submitted,

ARTHUR J. GOLDBERG
General Counsel
DAVID E. FELLER
Assistant General Counsel
Congress of Industrial Organizations
718 Jackson Place, N. W.
Washington 6, D. C.